

October 26, 2010

By electronic mail

Secretary S. Kimberly Belshé
California Health and Human Services Agency
1600 Ninth Street, Room 460
Sacramento, California 95814

Mr. William Barcellona
Co-Chair, California Privacy and Security Advisory Board
c/o California Association of Physician Groups
1215 K Street, Suite 1915
Sacramento, California 95814

Ms. Pamela Dixon
Co-Chair, California Privacy and Security Advisory Board
c/o World Privacy Forum
2033 San Elijo Avenue, No. 402
Cardiff by the Sea, California 92007

**RE: RECONSIDERING THE CALIFORNIA PRIVACY AND SECURITY ADVISORY
BOARD'S VOTE ON OCTOBER 12, 2010**

Dear Secretary Belshé, Mr. Barcellona, and Ms. Dixon:

Consumers Union and Center for Democracy & Technology respectfully urge the California Privacy and Security Advisory Board to reconsider its vote to recommend the proposed HIE Patient Consent Policy.

Prior to the Board's meeting on October 12, 2010, we forwarded a briefing paper explaining why the Privacy and Security Tiger Team's recent recommendations present a sound and practicable approach to patient consent in the context of health information exchange and technology. Board members around the table articulated considerable support for the Tiger Team's approach as a matter of policy, but then stated that they felt constrained to vote for the HIE Patient Consent Policy instead because they understood from CalOHII that California law requires an opt-in patient consent policy.

On the contrary, California law does not require an opt-in patient consent policy across the board for electronic exchange. As we explained in our briefing paper and

summarize below, we believe that California law supports the Tiger Team's balanced approach to privacy, security and patient consent for health information exchange in California. Because the premise for the Board's vote was mistaken and there is ample legal support for the Tiger Team's approach, we submit that the Board should reconsider its recommendation to the Secretary and should vote instead its considered judgment for the best policy to promote and support electronic health information exchange in California, perhaps by special telephonic meeting.

California law does not require an opt-in patient consent policy, and the Secretary and Board are free to adopt the Tiger Team's approach.

California law clearly states that, in general, a provider may disclose a patient's medical information to other providers for purposes of diagnosis or treatment without first obtaining the patient's authorization (consent). The Confidentiality of Medical Information Act (CMIA) states that providers may disclose the patient's medical information without prior authorization in certain enumerated categories,¹ and those enumerated categories explicitly include sharing the patient's medical information with another provider for purposes of diagnosis or treatment.² This law applies to disclosures of patients' medical information regardless of the medium of exchange or disclosure.

California law does require consent for disclosures of certain types of information, such as HIV test results and psychiatric records.³ When disclosing information covered by one of these special laws, providers must get authorization to disclose the information regardless of the medium of disclosure. Electronic exchange does not change this.

For almost thirty years since the enactment of these provisions, physicians, hospitals and clinics across California have been exchanging patients' health information with other providers for purposes of treating the patient without being required to first obtain the patient's consent, unless consent was already required by law. Such exchange has taken place in paper form and, more recently, in electronic form by early adopters of electronic health records. In all of those exchanges over these past thirty years, no court has held that such disclosure of patient health information under the Confidentiality of Medical Information Act, among providers for purposes of treatment, violates the right to privacy under California's Constitution.

¹ Cal. Civ. Code § 56.10, subd. (a) ("No provider of health care . . . shall disclose medical information regarding a patient . . . without first obtaining an authorization, except as provided in subdivision (b) or (c).").

² Id., § 56.10, subd. (c)(1) ("A provider of health care . . . may disclose medical information as follows: (1) The information may be disclosed to providers of health care . . . for purposes of diagnosis or treatment of the patient.").

³ Cal. Civ. Code § 56.104(a) (psychotherapist's notes); Cal. Health & Safety Code § 120980 (HIV test results).

Likewise, the Health Information Portability and Accountability Act (HIPAA) Privacy Rule states that a provider may disclose a patient's medical information to other providers for purposes of diagnosis or treatment without first obtaining the patient's consent.⁴

As we explained in our briefing paper, California's HIE policy must consider and balance many important pieces. The Tiger Team's recommendations build upon current law and present a comprehensive and well-vetted framework of privacy and security protections that can resolve the current impasse over consent and launch the full benefits of HIE in California. Because the Board's vote on October 12, 2010, appears to have been predicated on the mistaken premise that California law requires opt-in patient consent notwithstanding all the critical considerations that effective HIE policy must consider, Consumers Union and Center for Democracy & Technology respectfully urge the Board to reconsider its vote and to vote instead its considered judgment for the best policy for patient-centered health care in California.

Respectfully,



Mark Savage
Consumers Union of
United States



Deven McGraw
Center for Democracy
and Technology

enclosure

cc: Jonah Frohlich, Deputy Secretary, Health Information Technology
Alex Kam, Acting Director, Office of Health Information Integrity

⁴ 45 C.F.R. § 164.502, subd. (a)(1)(ii); id., § 164.506.